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No. 81-26

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PATRICIA MARKOT, and HAWTHORNE TEACHERS ASSOCIATION, a New Jersey Corporation,

Petitioners,

vs.

ROBERT N. HAUSNER, Principal of the Hawthorne High School, HAWTHORNE BOARD OF EDUCATION, JOHN B. INGEMI, former Superintendent of the Hawthorne School District and JOSEPH LIVATINO, Vice Principal of the Hawthorne High School,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Questions Presented

1. Whether the dismissal of a public high school teacher because of the use of a particular, reasonable teaching methodology is a violation of academic freedom under the First and Fourteenth Amendments to the United States Constitution.

2. Whether the mid-year discharge of a public high school teacher because of the use of a particular, reasonable teaching methodology, where that methodology was previously approved by the public employer and was overtly used by other employees, is a violation of the right to due process under the Fourteenth Amendment to the United States Constitution.

Parties to the Proceedings

Patricia Markot and the Hawthorne Teachers Association,* petitioners-plaintiffs.

Robert N. Hausner, John B. Ingemi, Joseph Livatino and the Hawthorne Board of Education, respondents-defendants.

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* The Hawthorne Teachers Association is an affiliate of the New Jersey Education Association.

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NO.

IN THE

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OCTOBER TERM, 1981

PATRICIA MARKOT, and HAWTHORNE TEACHERS ASSOCIATION, a New Jersey Corporation,

Petitioners,

vs.

ROBERT N. HAUSNER, Principal of the Hawthorne High School, HAWTHORNE BOARD OF EDUCATION, JOHN B. INGEMI, former Superintendent of the Hawthorne School District and JOSEPH LIVATINO, Vice Principal of the Hawthorne High School,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, Patricia Markot and the Hawthorne Teachers Association, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on April 16, 1981.

Opinions Below

Petitioners request review of the unreported decision of the United States Court of Appeals for the Third Circuit entered on April 16, 1981 by way of judgment order and without opinion. (Docket No. 80-2504, Third Circuit, April 16, 1981). The judgment order is reproduced in the Appendix at p. 1a, *infra.*

The decision of the United States District Court for the District of New Jersey is unreported. The opinion of the District Court is reproduced in the Appendix at p. 3a, *infra,* and the judgment order at p. 14a, *infra.*

Jurisdiction

The judgment of the United States Court of Appeals for the Third Circuit was entered on April 16, 1981. This petition for certiorari has been filed within 90 days of the date of said judgment. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1), which states:

> "cases in the courts of appeals may be reviewed by the Supreme Court . . .
>
> (1) By writ of certiorari granted upon a petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . ."

Constitutional Provisions Involved

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exer-

> cise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourteenth Amendment to the United States Constitution, Section 1, provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

This is a First and Fourteenth Amendment action brought by a public high school English teacher, Patricia Markot, and the teachers association of which she was a member, the Hawthorne Teachers Association, against her public employer, the Hawthorne Board of Education, a body corporate, and the principal, vice principal and former superintendent, individually. Petitioner was discharged in the middle of an academic year because of her use, on two occasions, of the teaching methodology of silent reading. Her use of that teaching technique, however, was in accordance with (a) her approved lesson plans, (b) the published course of study for English at the Hawthorne High School and (c) the established policy of the school administration.

Petitioners commenced this action in January, 1980 by filing a complaint in the United States District Court for the District of New Jersey. The jurisdiction of the District Court was invoked pursuant to the Civil Rights Act of 1871, 42 U.S.C. §1983, as an action arising under color of state law and under the First and Fourteenth Amendments to the United States Constitution for which petitioners sought declaratory and injunctive relief, reinstatement and compensatory and punitive damages. Although plaintiffs previously had commenced an action in the state courts in 1979, the prosecution of plaintiffs' federal claims was expressly reserved for proceedings in the courts of the United States pursuant to *England* v. *Louisiana State Board of Medical Examiners,* 375 U.S. 411 (1964).

Petitioners' case was presented in a non-jury trial in the United States District Court for the District of New Jersey. Petitioner Markot utilized the teaching technique of silent reading for a mere 20 minutes on each of two occasions during February, 1979, in connection with the teaching of the book *To Kill a Mockingbird.* She was subsequently instructed by the principal to discontinue use of the teaching technique of silent reading and, in accordance with that directive, never again used silent reading in her classroom. Nevertheless, she was discharged in the middle of the academic year approximately one week later, some ten days prior to acquisition of tenure, for the official reason that, ". . . the methodology of teaching of Patricia Markot, which included extensive implementation of silent reading, under the circumstances was not compatible with the best educational interests of the school district." The use of the teaching technique of silent reading, however, had been approved by petitioner's department chairman and was widely used by other teachers in the district. Unrebutted expert testi-

mony established the educational value and reasonableness of that teaching methodology, particularly with respect to the teaching of the novel as a form of literature and especially in light of the specific approval of that teaching technique by the published course of study for the English Department. Of equal importance was the conclusion by the expert that the particular teaching methodology used in silent reading was as substantively important to the quality of the learning process as the content of the novel itself.

Defendants thereafter moved for involuntary dismissal pursuant to Fed. R. Civ. P. 41(b), arguing that plaintiffs' case failed to state a cause of action upon which relief could be granted. The District Court for the District of New Jersey granted defendants' motion for involuntary dismissal and held that the use of a particular, reasonable teaching methodology was not a protected right of academic freedom under the First and Fourteenth Amendments to the United States Constitution. The District Court, whose opinion appears in the Appendix at p. 3a, *infra*, found substantive distinction between restrictions placed upon the content of a particular course and the methodology employed to teach that content. The District Court further found that the frequent utilization of the silent reading teaching technique by other teachers in the district had no constitutional impact upon her dismissal and that no substantive due process rights were implicated as a result of her mid-year discharge for the reasons stated.

On appeal to the United States Court of Appeals for the Third Circuit, petitioners argued that the judgment of the District Court for the District of New Jersey should be reversed as a matter of law. The Third Circuit disagreed and entered judgment without opinion, summarily affirming the decision of the District Court.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to resolve whether the use of a particular, reasonable teaching methodology is a protected right of academic freedom under the First and Fourteenth Amendments to the United States Constitution where the methodology in question is as substantively important to the teaching process as the content of the literature being taught.

The question of whether a particular teaching methodology, employed in a reasonable manner, is a protected right of academic freedom under the First and Fourteenth Amendments to the United States Constitution is an inquiry of substantial importance and widespread impact and one which is novel before this Court. The inquiry is particularly sharpened where the use of a given teaching methodology may be as critical to a substantive understanding of the literature being taught as the actual content of that literature. This issue is of great concern not only to the litigants, but also to public employees in general. The important questions of federal law raised by this petition require that this Court exercise its discretion and grant the issuance of a writ of certiorari.

This Court has long held that the vigilant protection of constitutionally guaranteed freedoms is "nowhere more vital than in the community of American schools," *Shelton* v. *Tucker,* 364 U.S. 479, 487 (1960), and that governmental intervention with constitutional rights of members of the academic community will be deemed particularly offensive where that interference threatens the flourishing of scholarship and free academic inquiry. *Sweezy* v. *State of New Hampshire,* 354 U.S. 234, 250 (1957);

Barenblatt v. *United States,* 360 U.S. 109, 129 (1959); *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 637 (1943). Further, this Court has historically recognized the constitutional impermissibility of unreasonable restrictions placed upon the teaching of substantive content. *Meyer* v. *State of Nebraska,* 262 U.S. 390, 400-401 (1923); *Bartels* v. *State of Iowa,* 262 U.S. 404 (1923); *Epperson* v. *Arkansas,* 393 U.S. 97 (1968).

It is now well-settled that the First Amendment to the United States Constitution will not countenance the imposition of rules or regulations "that case a pall of orthodoxy" over the classroom, *Keyishian* v. *Board of Regents,* 385 U.S. 589, 603 (1967). The concern of this Court that teachers and students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker* v. *Des Moines Independent Community School District,* 393 U.S. 503, 506 (1969), is reflected in the well-established doctrine of academic freedom. *Sweezy* v. *State of New Hampshire, supra; Keyishian* v. *Board of Regents, supra; Healy* v. *James,* 408 U.S. 169, 180-181 (1972). As this Court stated in *Healy* v. *James, supra,* "... we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom." 408 U.S. at 180-181.

The District Court for the District of New Jersey reasoned that the apparent absence of restriction upon course content, as distinguished from the methodology used to teach that content, required a finding that no First Amendment values were implicated. That conclusion, however, is illogical and legally unsound once it is established, by competent expert testimony,* that the method of teach-

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* As to judicial directive concerning the propriety of expert testimony in an academic freedom setting and the significant weight to be afforded that testimony, see *Mailloux* v. *Kiley,* 323 F. Supp. 1387, 1390-1392 (1971); affirmed, 448 F. 2d 1242, 1243 (1st Cir. 1971).

ing a particular novel, in some cases, may be as important to a substantive comprehension of the literature in question as the actual content of the book being taught. The equation of methodology with content, in the appropriate case, is a well-recognized educational concept which now requires the analysis and guidance of this Court in light of the widespread impact of the constitutional implications of that concept upon public employees and public employers at large and, in particular, upon the professional educators and public school teachers of our nation.

Explicit judicial recognition has been given to the necessity of affording First Amendment protection to the use of a particular, reasonable teaching methodology. In *Wilson* v. *Chancellor*, 418 F. Supp. 1358 (D. Ore. 1976), a federal district court set forth the rationale for affording such protection:

> These cases* also recognize the validity of a popular maxim, "the medium is the message." *The expresser's medium can affect the persuasiveness of his message, the duration of its influence, and the size and type of audience which its reaches. The act of teaching is a form of expression, and the methods used in teaching are media.* Wilson's use of political speakers was his medium for teaching; similarly, the short story was Parducci's medium, the pamphlets were Sterzing's media, and the article containing the controversial words was Keefe's medium. *The various school boards which restricted*

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* *Keefe* v. *Geanakos*, 418 F. 2d 359 (1st Cir. 1969), *Parducci* v. *Rutland*, 316 F. Supp. 352 (M.D. Ala. 1970), and *Sterzing* v. *Fort Bend Independent School Dist.*, 376 F. Supp. 657 (S.D. Tex. 1972).

> *the media employed by Wilson here, and by Keefe, Parducci, and Sterzing in the cases cited, suppressed expression which the First Amendment protects.* 418 F.Supp. at 1363-1364 (emphasis added)

This Court should grant a writ of certiorari in this case in order to provide much needed guidance to public school teachers and professional educators who seek to utilize a particular, reasonable teaching methodology as well as to provide a directive to the lower federal courts which have been charged by this Court with the coveted protection of the classroom as "particularly the 'market-place of ideas.'" *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967).

Certiorari should be granted because the courts below misconstrued the clear weight of authority which affords constitutional protection to the use of a particular, reasonable teaching methodology under the First and Fourteenth Amendments to the United States Constitution.

The District Court for the District of New Jersey found that the use of particular, reasonable teaching methodology was deserving of no constitutional protection and dismissed plaintiffs' complaint. That Court also held that petitioner's mid-year discharge as a result of her use of a previously approved and widely used teaching methodology implicated no Fourteenth Amendment due process considerations. The United States Court of Appeals for the Third Circuit summarily agreed, without opinion. These holdings, however, are legally unsupportable and are contrary to the clear weight of authority. This Court, accordingly, should grant a writ of certiorari in order to rectify the widespread, adverse impact of such a holding upon the professional educators of our nation's public schools.

The District Court reasoned that petitioner's use of a particular, reasonable teaching methodology implicated no First Amendment values, relying on *Hetrick* v. *Martin*, 480 F. 2d 705 (6th Cir. 1973), *cert.* den., 414 U.S. 1075 (1973) and *Ahern* v. *Board of Education of the School District of Grand Island*, 456 F. 2d 399 (8th Cir. 1972). Reliance on *Hetrick*, however, is legally unsound. First, the Court in that case was largely concerned with the absence of any expert testimony concerning the extent to which plaintiff's teaching methods were "acceptable . . . within the profession." 480 F. 2d at 709. In contrast to the plaintiff in *Hetrick*, petitioner Markot presented extensive expert testimony, unrebutted before the District Court, establishing that her use of the particular teaching methodology in question was not only reasonable, but educationally prudent. Secondly, the District Court for the District of New Jersey failed to recognize that *Hetrick* was decided in 1973, some three years prior to the decision by the same circuit court of appeals in *Minarcini* v. *Strongsville City School District*, 541 F. 2d 577 (6th Cir. 1976) in which the United States Court of Appeals for the Sixth Circuit affirmed the District Court's approval of constitutional protection of "individual teaching methodology." 541 F. 2d at 584.

Thirdly, the *Hetrick* Court clearly stated, see 480 F. 2d at 709, that its holding was compelled by the decision of this Court in *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564 (1972). The "only question" before this Court in *Roth*, however, was "whether the respondent had a constitutional right to a statement of reasons and a hearing on the University's decision not to rehire him for another year." 408 U.S. at 569. This Court specifically stated in its opinion that the issue of alleged violation of respondent's First Amendment right of academic freedom "is not now before us." 408 U.S. at 574. *Hetrick*, there-

fore, can provide no sound legal basis for the opinion and judgment of the District Court, or the summary affirmation of that opinion by the Third Circuit.

The District Court for the District of New Jersey also relied upon *Ahern* v. *Board of Education of the School District of Grand Island,* 456 F. 2d 399 (8th Cir. 1972) for the proposition that the use of a particular reasonable teaching methodology implicates no First Amendment values. *Ahern,* however, involved a plaintiff teacher who engaged in activity so disruptive of the daily functioning of the school system that an analysis of her conduct in light of the two-pronged test of *Tinker* v. *Des Moines Independent Community School District,* 393 U.S. 503, 509 (1969), justified the failure of the United States Court of Appeals for the Eighth Circuit to invoke the constitutional protections to which the plaintiff otherwise would have been entitled.

The affirmation by the United States Court of Appeals for the Third Circuit of the District Court's dismissal of plaintiffs' complaint was also unsound because of the contrary weight of authority which holds that the use of a particular, reasonable teaching methodology is entitled to protections of federal constitutional dimension. *Keefe* v. *Geanakos,* 418 F. 2d 359 (1st Cir. 1969); *Mailloux* v. *Kiley,* 323 F. Supp. 1387 (D. Mass. 1971); affirmed, 448 F. 2d 1242, 1243 (1st Cir. 1971); *Parducci* v. *Rutland,* 316 F. Supp. 352 (M.D. Ala. 1970); *Sterzing* v. *Fort Bend Independent School District,* 376 F.Supp. 657 (S.D. Tex. 1972), remanded for reconsideration as to remedy only, 496 F. 2d 92 (5th Cir. 1974); *Kingsville Independent School District* v. *Cooper,* 611 F. 2d 1109 (5th Cir. 1980); *Minarcini* v. *Strongsville City School District,* 541 F. 2d 577 (6th Cir. 1976); *Webb* v. *Lake Mills Community School District,* 344 F.Supp. 791 (N.D. Iowa 1972); *Wilson* v. *Chancellor,* 418 F. Supp. 1358 (D. Ore. 1976); *East Hartford*

Education Association v. *Board of Education of the Town of East Hartford,* 562 F. 2d 838, 842-844 (2nd Cir. 1977).

The District Court for the District of New Jersey also reasoned that the summary discharge of petitioner Markot for using an approved teaching methodology which simultaneously was being used overtly by other employees, failed to implicate any due process considerations under the Fourteenth Amendment. As indicated, the United States Court of Appeals for the Third Circuit affirmed, without opinion. This result, however, is equally contrary to the weight of authority holding that the application, without warning, of a performance standard in direct opposition to prior policy constitutes a denial of substantive due process. *Keyishian* v. *Board of Regents,* 385 U.S. 589, 603-604 (1967); *Sterzing* v. *Fort Bend Independent School District,* 376 F. Supp. 657, 662 (S.D. Tex. 1972); *Mailloux* v. *Kiley,* 323 F.Supp. 1387, 1392; affirmed, 448 F. 2d 1242, 1243 (1st Cir. 1971); *Parducci* v. *Rutland,* 316 F.Supp. 352, 356-358 (N.D. Ala. 1970); *Keefe* v. *Geanakos,* 418 F.2d 359, 362 (1st Cir. 1969); *Dean* v. *Simpson Independent School District* (Slip Opinion at 11, August 21, 1979) (E.D. Tex.); *Webb* v. *Lake Mills Community School District,* 344 F.Supp. at 799, 804-805 (N.D. Iowa 1972); *Pico* v. *Board of Education of Island Trees Union Free School District No. 26* (Slip Opinion at 6036-6037, October 2, 1980) (2nd Cir.).

The holding of the court in *Sterzing* v. *Fort Bend Independent School District, supra,* is demonstrative of the weight of authority which was ignored by the Courts below in this case:

> The Court finds these rights to be evident, the substantive rights of a teacher to choose a teaching method, which, in the Court's view, on the basis of expert opinion, served a demonstrated educa-

> tional purpose, *and the procedural right of a teacher not to be discharged for the use of a teach-in method which was not proscribed by a regulation or definitive administrative action, and as to which it was not proven that he had notice that its use was prohibited.* 376 F.Supp. at 662. (emphasis added)

A writ of certiorari should issue so that this Court can provide much needed guidance to the lower federal courts and to professional educators concerning the extent of the protective ambit of First Amendment right of academic freedom.

The involuntary dismissal of plaintiffs' complaint pursuant to Fed. R. Civ. P. 41(b) creates a sharper conflict among the circuits which can only be resolved by an authoritative ruling of this Court.

There existed a conflict among the circuit courts prior to the initiation of this litigation concerning the recognition of a federal cause of action based upon the right of academic freedom under the First and Fourteenth Amendments and, in particular, based upon the right to utilize a particular, reasonable teaching methodology. That division among the circuit courts, however, has been made deeper by the ruling of the United States Court of Appeals for the Third Circuit in this case. Until the decision below dismissing plaintiffs' complaint for failure to state a federal cause of action, the Third Circuit had aligned itself neither with those circuits providing such relief nor with those denying the existence of such a cause of action. The resultant repudiation of a federal cause of action by the Third Circuit, however, has created a deepened conflict of greater import to federal litigants than

existed previously: the very existence of a federal cause of action concerning coveted First Amendment rights has now been jeopardized in a substantive manner.

Most courts, or courts within the respective circuits, hold that the use of a reasonable teaching methodology, particularly where that teaching method has been previously approved by the public employer and as to which no notice of disapproval has issued, invokes First and Fourteenth Amendment protection. *Keefe* v. *Geanakos,* 418 F. 2d 359 (1st Cir. 1969); *Mailloux* v. *Kiley,* 448 F. 2d 1241 (1st Cir. 1971); *East Hartford Education Association* v. *Board of Education of the Town of East Hartford,* 562 F. 2d 838 (2nd Cir. 1977); *Kingsville Independent School District* v. *Cooper,* 611 F. 2d 1109 (5th Cir. 1980); *Minarcini* v. *Strongsville City School District,* 541 F. 2d 577 (6th Cir. 1976); *Webb* v. *Lake Mills Community School District,* 344 F. Supp. 791 (N.D. Iowa 1972) (8th Cir.); *Wilson* v. *Chancellor,* 418 F. Supp. 1358 (D. Ore. 1976) (9th Cir.).

With the ruling in this case, however, the Third Circuit has aligned itself with those circuits in which it is held that no federal constitutional protections are implicated by the use of a particular, reasonable teaching methodology. *Presidents Council, District 25* v. *Community School Board No. 25,* 457 F. 2d 289 (2nd Cir. 1972), *cert.* den., 409 U.S. 998 (1972); *Hetrick* v. *Martin,* 480 F. 2d 705 (6th Cir. 1973), *cert.* den., 414 U.S. 1075 (1973); *Clark* v. *Holmes,* 474 F. 2d 928 (7th Cir. 1972), *cert.* den., 411 U.S. 972 (1973); *Ahern* v. *Board of Education of the School District of Grand Island,* 456 F. 2d 399 (8th Cir. 1972).

As a result of the decision below by the Third Circuit, an increasingly deeper division has developed among the circuits which can only be rectified by the issuance

of a writ of certiorari and subsequent guidance by this Court. This conflict has resulted in a glaring lack of uniformity throughout the federal system in which most circuits recognize the existence of a federal cause of action extending to protect the use of reasonable teaching methodology, while others do not. That conflict has also resulted in an increasing inability of professional educators in our public schools to reasonably know what teaching conduct is protected and what teaching conduct may result in termination of employment. The existence of such imprecise standards and the resultant potential for the imposition upon teachers of conditions restrictive of First Amendment academic freedom cannot be tolerated by this Court. *Epperson* v. *Arkansas,* 393 U.S. 97, 105, 107 (1968).

This case presents a more compelling reason for the issuance of a writ of certiorari than one which does not reveal such a severe dichotomy between the lower federal courts with respect to the existence of a federal cause of action in the first instance. The writ should issue for that reason, Rule 19(b); *United States* v. *O'Malley,* 383 U.S. 627, 630 (1966), and also since the issues presented herein are of widespread impact upon the professional educators and public school teachers of this nation.

It is respectfully submitted that the judgment of the United States Court of Appeals for the Third Circuit is constitutionally infirm.

CONCLUSION

For the foregoing reasons, it is respectfully urged that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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Dated: July 1, 1981

APPENDIX A

Judgment of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 80-2504

MARKOT, PATRICIA, and HAWTHORNE TEACHERS ASSOCIATION, a New Jersey Corporation,

Appellants,

v.

HAUSNER, ROBERT N., Principal of the Hawthorne High School, HAWTHORNE BOARD OF EDUCATION, JOHN B. INGEMI, former Superintendent of the Hawthorne School District, and JOSEPH LIVATINO, Vice Principal of the Hawthorne High School,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

D.C. Civil No. 80-00255

Argued March 23, 1981

Appendix A

Before:

HUNTER, SLOVITER and WISDOM,* *Circuit Judges*

JUDGMENT ORDER

After consideration of all contentions raised by appellants, it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellants.

By the Court,

JAMES HUNTER, III, *Circuit Judge*

Attest:

SALLY MAVOS, Clerk

Date: April 16, 1981

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* Honorable John M. Wisdom, United States Circuit Judge for the Fifth Circuit, sitting by designation.

APPENDIX B

Oral Opinion of the United States District Court for the District of New Jersey

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

PATRICIA MARKOT and HAWTHORNE TEACHERS ASSOCIATION, a New Jersey Corporation,

Plaintiffs,

vs.

ROBERT N. HAUSNER, Principal of the Hawthorne High School, HAWTHORNE BOARD OF EDUCATION, JOHN B. INGEMI, former Superintendent of the Hawthorne School District, and JOSEPH LIVATINO, Vice Principal of the Hawthorne High School,

Defendants.

• • •

(4.90)* Now, these are defendants' motions for involuntary dismissal of the plaintiffs' case pursuant to Rule 41(b)

* Figures in parentheses refer to each new page of the stenographic transcript.

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of the Federal Rules of Civil Procedure. In accordance with that Rule, I hereby make the following findings of fact and conclusions of law:

(1) The plaintiff, Patricia Markot, hereinafter called "Markot," is a citizen of the State of New Jersey, was employed as a teacher of English at Hawthorne High School by Defendant Hawthorne Board of Education, hereinafter "Board," from March 1976 through February 20, 1979.

(4.91) (2) Markot was hired by the Board for the year 1978-'79 school year, by a written contract, for the period from September 1, 1978 to June 30, 1979. Under New Jersey law, she would have achieved tenure if she had remained in the Board's employ on March 8th, 1979.

(3) Markot is a member of Plaintiff Hawthorne Teachers Association, a co-plaintiff a (sic) duly-recognized and certified exclusive labor representative of the teachers employed by the Hawthorne Board of Education.

(4) Defendant, Robert Hausner, hereinafter "Hausner," has been employed by Defendant Board since February 1, 1979 as principal of the Hawthorne High School, and had direct supervisory authority over Markot.

(5) Plaintiff, John B. Ingemi, was at all relevant times employed by Defendant Board as the superintendent of schools for the Hawthorne School District, and was responsible for the general supervision of the district's schools.

(6) Defendant, Joseph Livatino, was (4.92) at all relevant times employed by Defendant Board as a vice principal of the Hawthorne High School, and had direct supervisory authority over Markot.

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(7) Frank Krueger, "Krueger," was employed by Defendant Board as a department chairman of the English Department, and had direct supervisory authority over Markot.

(8) Pursuant to Board policy, Markot was required to submit her lesson plans to Krueger for approval.

(9) From time to time during the course of her employment by the Defendant Board, Markot used the teaching technique of in-class silent reading, with the knowledge of Krueger, she and her students participating therein.

(10) Other English teachers in Hawthorne High School, and some teachers in the elementary school, upon occasion had used in-class silent reading, and the technique is regarded by some educators, including experts, as a legitimate teaching technique.

(11) The technique of in-class silent reading was never either expressly or clearly impliedly approved by the Board for general use (4.93) in Hawthorne High School.

(12) On January 17, 1979, Krueger approved Markot's lesson plans for February 5th and 6th, 1979. Incorporating by reference lesson plans regarding the teaching of "To Kill a Mockingbird" which had originally been scheduled to be taught in October 1978, but had been rescheduled due to the unavailability of materials in October. (sic)

(13) The lesson plans for the teaching of the novel "To Kill a Mockingbird" had also been approved by Krueger on September 18, 1978.

(14) Those lesson plans included a notation "Some class time will be allowed from time to time for in-class silent reading."

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(15) On February 1, 1979, Hausner was first employed as principal of the Hawthorne High School.

(16) Hausner observed Markot's Fourth Period English class on February 5th, 1979 for 20 minutes. And on February 6th for 20 minutes, each class period lasted 42 minutes.

(4.94) (17) During the portions of the class periods when Hausner observed Markot's Fourth Period English class, the class was engaged in silent reading of "To Kill a Mockingbird."

(18) By memorandum dated February 6, 1979, Hausner directed Markot to meet with him in his office, bringing her lesson plans for February 6th and 7th, as well as her unit plan on "To Kill a Mockingbird." The meeting took place on February 8, 1979.

(19) On February 6th Hausner had directed Markot not to use silent reading as a technique. As a result of Hausner's directive, Markot ceased using silent reading as a teaching technique.

(20) Hausner prepared a teacher appraisal, dated February 13, 1979, based upon his observations on February 5th and 6th. That evaluation indicated that Markot was not competent and noted that she needed improvement in 12 of 21 areas evaluated.

(21) The evaluation was sent to Markot with a letter from Hausner dated February 14, 1979, in which he informed her (4.95) that because of her unsatisfactory performance on two occasions, and a strong disagreement with educational philosophy in terms of what is construed by teacher responsibility and student learning, he was recommending to the Board of Education that her tenure be denied.

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(22) Relying on Hausner's recommendation and teacher appraisal, Ingemi informed the plaintiff by letter dated February 15, 1979, that he would recommend to the Board that it terminate plaintiff's contract as a teaching staff member at its meeting to be held on February 20th.

(23) On February 20th, defendants met in closed session to discuss Markot's continued employment. Markot appeared accompanied by her representative.

(24) By letter dated February 27, 1979, Ingemi informed Markot that the Board had adopted a resolution terminating her employment the previous day, February 26th, and denying her tenure.

(25) The reasons given for the Board's action were that Markot's methodology, (4.96) including the use of silent reading, was not compatible with the best educational interests of the school district.

(26) The letters of Hausner and Ingemi, Hausner's teacher appraisal and the Board's resolution terminating plaintiff's employment have been placed in Markot's personnel file.

(27) The Hawthorne Board's action of termination was affirmed by the Commissioner of Education, who was in turn affirmed by the New Jersey State Board of Education. Both the Commissioner and the State Board approved the Hawthorne Board's determination that silent reading was not an approved teaching technique, and that philosophical differences existed between Markot and Hausner. Both appellate tribunals ruled that those factors justified the Hawthorne Board of Education action.

Conclusions of law:

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This Court has jurisdiction over the parties and the subject matter of this litigation by reason of the provisions of 28 U.S.C. Section 1343, 2201 and 2202; and (4.97) 42 U.S.C. Sections 1983 and 1988; and the First and Fourteenth Amendments to the United States Constitution.

Both parties to this litigation have conceded, and this Court holds, that the primary ground upon which plaintiff's cause of action on Section 1983 rests is the First Amendment to the United States Constitution. Plaintiffs' argument is that Markot possesses a First Amendment right to and interest in the teaching of English literature by means of the technique of silent reading. This First Amendment argument has three components.

First, plaintiffs assert that Markot, as a matter of Federal constitutional (First Amendment) law, had a right to employ silent reading as a teaching method.

Second, plaintiffs claim that Markot's termination for exercising this alleged constitutional right deprived her of liberty in violation of the Fourteenth Amendment's guarantee of substantive due process.

Third, plaintiffs claim that Markot's termination for using silent reading denied (4.98) her the Fourteenth Amendment right to equal protection of the laws, in that other teachers at Hawthorne employed silent reading and were not terminated.

Additionally, plaintiffs claim that Markot had a substantive due process liberty interest in having her personnel file free of substantial false information, and a substantive due process property interest in her continued employment.

These legal assertions will be addressed seriatum:

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(1) After a careful review of the cases cited by both sides to this controversy, this Court is of the opinion and so holds, that the First Amendment's protection of freedom of expression in the academic community does not extend to insulate from review by a teacher's superiors, the methods as opposed to the substantive content of her instruction. This Court is of the opinion that all of the cases cited in plaintiffs' brief which allegedly support plaintiffs' claim are distinguishable. In all of said cases, the courts were concerned (4.99) with and generally invalidated on First Amendment grounds, restrictions placed upon the content as opposed to the methodology of the teachers courses. For example, restrictions on the books he or she assigned, or upon the free discussion and dissemination by the teacher of politically controversial ideas. Plaintiffs' claim that a teacher's methodolgy is an issue of academic freedom within the intendment of the First Amendment, is simply unsupported in the holdings of the cases in plaintiff's own brief.

This Court finds reasoned guidance for its holding that the silent reading method implicates no First Amendment values in *Hetrick* v. *Martin*, 480 F.2d 705 (Sixth Circuit), *certiorari denied*, [414] U.S. 1075 (1973), and in *Ahern* v. *the Board of Education of Grand Island*, 456 F.2d 399 (Seventh Circuit 1971), cases which are not cited by the plaintiffs. In both of those cases the courts held that the non-tenured teachers in question had no First Amendment or substantive due process rights to pursue a method of teaching which contravened the (4.100) dictates of their employers regarding classroom procedures. *Hetrick, supra* at pages 708-09; *Ahern, supra* at 403 and 404.

This Court's holding is in no manner affected by the fact that several Hawthorne teachers have employed silent

reading. The mere fact that a person has engaged in a certain practice obviously does not talismanically convert that practice into a Federal constitutional right. See *Hetrick, supra* page 709. Constitutional rights do not emanate from custom or fashion.

Second, having concluded that Markot had no First Amendment right to employ silent reading as a teaching method, it follows that she was not deprived of liberty within the meaning of the Fourteenth Amendment, by not being permitted to use this method.

Three, plaintiffs' Fourteenth Amendment equal protection argument is also rejected. Since Markot neither asserted nor established the existence of any constitutional suspect classification, and since this Court has already concluded that she (4.101) has not been deprived of any fundamental constitutional right by not being permitted to use silent reading, the only inquiry is whether the Board's decision to terminate had a rational basis. *Harrah Independent School District* v. *Martin,* 440 U.S. 194, at 199 (1979), a *per curiam.* The Court concludes that the Board's decision was rational. Clearly the Board has the right and the authority to decide that it does not wish to employ a teacher who employs a teaching method dissonant to what the Board considers established and conventional practices. The fact that other teachers in Hawthorne occasionally employed silent reading, and that the method is accepted by some experts as valid, does not render the Board's decision irrational or arbitrary in a constitutional sense, for this Court has found no compelling evidence that the Board was aware of and approved the use of this method by teachers other than Markot. Again, just because Markot's teaching style is considered acceptable by some within the teaching profession does not mean that

the (4.102) Board acted arbitrarily in refusing to insulate her style from its review in determining whether she merited continued employment or tenured status. See *Hetrick,* again at 709.

Moreover, this Court will not undertake a *de novo* review of whether silent reading should be a teaching method approved by the Hawthorne Board, for this is precisely the sort of academic terrain upon which a Federal Court must not tread. *Doherty* v. *Rutgers School of Law Newark,* 487 Fed. Supp. 1291 at 1297 note 4, decision by this Judge. See also *Chung* v. *Park,* 514 F.2d, 382, at 387, note 8 (Third Circuit 1975); *Keddie* v. *Pennsylvania State University,* 412 Fed. Supp. 1254 at 1270 (Middle District of Pennsylvania 1976).

Four, Plaintiff Markot's claim that she possesses a substantive due process liberty interest in having her personnel file free of false information can be quickly disposed of. Plaintiff Markot would have cause to complain only if the file contained "substantially false information (4.103) with respect to her work performance or the reasons for her discharge." *Ledford* v. *DeLancey,* 612 F.2d 883, page 887 (Fourth Circuit 1980).

However, plaintiffs' claim regarding the personnel file hinges on the assumption that statements in the file that Markot was dismissed on account of her teaching method and her incompetence are substantially false. With regard to statements concerning her teaching method, the Court has already concluded that this was a rational reason for the Board to dismiss. Accordingly, these statements do not meet the "substantially false" requirement. With regard to statements in the file to the effect that Markot was dismissed for incompetence, the Court notes that such statements apparently represent the subjective judgment

of Markot's superiors, including the Board. This Court is not permitted to substitute its own subjective judgment, whatever it may be, of Markot's competence as a teacher for the judgments of her employer. See generally *Board of Curators of University of* (4.104) *Missouri* v. *Horowitz*, 435 U.S. 78, at page 91, (1978), quoting *Epperson* v. *Arkansas*, 393 U.S. 97, at page 104 (1968). Courts may not serve as super-tenure review committees. *Keddie, supra* at page 1270. Thus, the Court cannot hold that statements in Markot's personnel file impugning her competence, as a matter of law or fact, are substantially false. It follows that no substantive due process liberty interest of Markot's has been violated.

Five, turning finally to plaintiffs' claim that Markot had a substantive due process property right in continued employment, the short and dispositive answer to this is that she was non-tenured at the time of her dismissal, and thus had nothing more than a unilateral expectancy of continued employment.

Board of Regents v. *Roth*, 408 U.S. 564, page 577 (1972). Looking to New Jersey law, and I must under *Roth, supra*, this Court holds that plaintiff was an employee terminable at will, subject only to the contractual requirement that she be given 60 days notice. (4.105) See *Mozier* v. *Board of Education of Cherry Hill Township*, 450 Fed.Supp. 742 at 748, this court, (1977); *Canfield* v. *Board of Education of Pine Hill Borough*, 51 N.J. 400 (1968). In light of the above analysis, this Court does not reach the issue of collateral estoppel.

For all of the foregoing reasons, plaintiffs' complaint must be dismissed, with prejudice.

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Exercising its discretion, the defendants' request for attorneys' fees under 42 U.S.C. 1988 are denied. Each side to bear its own costs.

Defendants shall prepare an appropriate order forthwith. So ordered.

(Court adjourned.)

APPENDIX C

Judgment of the United States District Court for the District of New Jersey

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

PATRICIA MARKOT and HAWTHORNE TEACHERS ASSOCIATION, a New Jersey Corporation,

Plaintiffs,

vs.

ROBERT N. HAUSNER, Principal of the Hawthorne High School, HAWTHORNE BOARD OF EDUCATION, JOHN B. INGEMI, former Superintendent of the Hawthorne School District, and JOSEPH LIVATINO, Vice Principal of the Hawthorne High School,

Defendants.

This matter having been tried before the Court on July 29 and 30, 1980 and August 4 and 5, 1980, and the plaintiffs having been represented by Greenberg & Mellk (William S. Greenberg, Esq. appearing) and defendants Hausner, Ingemi and Livatino being represented by Schenck, Price, Smith & King (David B. Rand, Esq. and Robert M. Tosti, Esq. appearing) and the defendant Hawthorne Board of Education being represented by Jeffer, Hopkinson & Vogel

(Reginald F. Hopkinson, Esq. appearing); and all defendants having moved for an involuntary dismissal of all claims asserted by plaintiffs at the conclusion of plaintiffs' case based upon the provisions of *Fed.R.Civ.P.* 41(b); and the Court, as the trier of fact, having considered the evidence presented during the plaintiffs' case as well as the applicable law, and having further rendered an oral decision in connection with the motion on August 5, 1980, which included findings of fact and conclusions of law as required by *Fed.R.Civ.P.* 52(a); and the Court having determined that upon the facts and the law plaintiffs have shown no right to relief and that defendants are entitled to a judgment of dismissal;

Now, Therefore, in accordance with the oral decision, findings of fact and conclusions of law rendered by the Court as aforesaid;

It Is on this 25 day of August, 1980, Ordered, Decreed and Adjudged that judgment of no cause for action be and is hereby entered in favor of all defendants dismissing with prejudice all claims asserted by plaintiffs against all defendants in this action; and

It Is Further Ordered that the within judgment of dismissal shall be without costs to any party and that defendants' application for counsel fees and costs as "prevailing parties" pursuant to the provisions of 42 U.S.C. §1988 be and is hereby denied.

Lawrence A. Whipple, U.S.D.J.

NO. 81-26

Office-Supreme Court, U.S.
FILED
AUG 10 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

PATRICIA MARKOT, and HAWTHORNE TEACHERS ASSOCIATION, a New Jersey Corporation,

Petitioners,

vs.

ROBERT N. HAUSNER, Principal of the Hawthorne High School, HAWTHORNE BOARD OF EDUCATION, JOHN B. INGEMI, former Superintendent of the Hawthorne School District and JOSEPH LIVATINO, Vice Principal of the Hawthorne High School,

Respondents.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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Counter-Statement of Questions Presented

1. Does a board of education act within constitutional parameters when it denies the accrual of tenure to an English teacher based on a factual determination that for entire class periods during a two and three day time span her entire teaching performance comprised no other activity except a physical presence in class during which time both she as a teacher and her pupils as students of English were solely involved in reading to themselves which the Board of Education concluded in the exercise of its broad discretion constituted an abdication of any bona fide teaching effort or at the very least an unimpressive teaching performance undeserving of a tenured appointment; or, is it conceivable that such a determination to deny tenure under such circumstances is a violation of academic freedom, freedom of speech or any possible constitutional right of the individual so involved.

2. Is the insistence of the petitioner as a nontenured employee that the activity described as "silent reading" is a viable educational methodology render the assessment of the board of education to deny tenure a violation of petitioner's substantive due process rights under the Fourteenth Amendment to the United States Constitution.

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NO. 81-26

IN THE

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OCTOBER TERM 1981

PATRICIA MARKOT, and HAWTHORNE TEACHERS ASSOCIATION, a New Jersey Corporation,

Petitioners,

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Respondents.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

Opinions Below

The decision of the United States District Court for the District of New Jersey is unreported. The opinion of the District Court is reproduced in petitioners' Appendix (A. 3-13).

The decision of the United States Court of Appeals for the Third Circuit entered on April 16, 1981, by way of judgment order is without opinion. (Docket No. 80-2504, Third Circuit, April 16, 1981). The judgment order of the Third Circuit is reproduced in petitioners' Appendix (A. 1-2).

Jurisdiction

Petitioners seek a review on writ of certiorari and this Court's jurisdiction, pursuant to 28 U.S.C. §1254(1), which provides:

> "cases in the courts of appeals may be reviewed by the Supreme Court . . .
>
> (1) By writ of certiorari granted upon a petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . ."

Jurisdiction before the United States District Court for the parties in the subject matter of the litigation was pursuant to the provisions of 28 U.S.C. §§1343, 2201 and 2202; and 42 U.S.C. §§1983 and 1988; and the First and the Fourteenth Amendments to the United States Constitution.

Counter-Statement of the Case

Respondent, Hawthorne Board of Education, declined to grant tenure to petitioner Markot, a non-tenured teaching staff member at Hawthorne High School. Respondent Board of Education exercised a sixty-day notice of termination provision that is provided in the contract of each non-tenured teaching staff member employed in the school district. The respondent Board exercised its dis-

cretion in denying a tenure appointment to petitioner pursuant to the recommendation of its entire administrative staff on the basis of their assessment of petitioner's teaching performance.

The principal of the high school, respondent Hausner, subsequent to observing the petitioner Markot conducting an English I class for two consecutive days during which the students did nothing but read a novel in class to themselves while the teacher read the same assigned novel in class to herself, deemed this to be less than an adequate performance for the teaching of freshman English. This procedure and methodology described by the petitioner as "silent reading" is contended by the petitioner to be an educational procedure or methodology that petitioner Markot possesses a constitutional right to use in class to whatever extent petitioner desires.

This procedure implemented by petitioner for the entire period of a first-year English class for three consecutive days, in addition to deficiencies in her daily plan book, were the reasons expressed by the three respondent school administrators—principal, vice principal and superintendent of schools—who unanimously urged the denial of a tenure appointment to the petitioner.

The New Jersey Commissioner of Education denied an appeal by the petitioner Markot, concluding that the respondent Board of Education properly exercised discretion in not granting tenure to petitioner. The New Jersey State Board of Education affirmed the decision of the Commissioner indicating that the Board of Education and the Course of Study did not approve the procedure or methodology of "silent reading" as asserted by the petitioner Markot. Petitioner Markot, before this Court and in the trial Court, somewhat obscures the fact that petitioner was a nontenured employee whose services were terminated prior to achieving tenure.

Petitioner Markot asserts a violation of the First and Fourteenth Amendments to the United States Constitution in that her termination prior to her obtaining tenure, or the denial of tenure to her, based on the assessment and recommendations of the entire administrative staff of the Hawthorne Board of Education, is an impermissible intrusion of her freedom of speech and her academic freedom.

In the early part of 1979, the respondent, Hawthorne Board of Education, employed a new principal in the Hawthorne High School. The principal, on February 5, 1979, entered the classroom of the petitioner Markot at the beginning of the period and observed her purportedly teaching an English I class, remaining in the classroom for half the class period from 11:15 A.M. until 11:35 A.M. During the twenty minutes of observation, petitioner Markot sat at the desk reading the book "To Kill a Mockingbird", and the entire class likewise engaged in what petitioner Markot described as "silent reading" of the same novel. During the entire time that the principal observed the class there was no communication between the petitioner Markot and the class, nor were there any worksheets or notebooks on the students' desks.

The principal indicated to the petitioner Markot that what he observed on the 5th day of February, 1979, was not indicative of actual classroom teaching and that there was no purpose to his remaining for what was in his view a study period. The principal stated to petitioner Markot on February 5, 1979, that he would return in the future to observe evidence of an actual teaching performance.

The very next day, February 6, 1979, believing it essential to observe the petitioner Markot in the midst of actual teaching such as a literature discussion, the principal, Dr. Hausner, entered the classroom halfway through the pe-

riod, at 11:30 A.M., and the students were once more silently reading the novel, "To Kill A Mockingbird". Petitioner Markot did not even notice the presence of the principal in the classroom. At the termination of the entire class period, the petitioner Markot finally looked up, noticed the principal seated in the rear of the room, walked toward him and stated that if he, the principal, desired to see a literature lesson he should return in two days or visit one of her other English classes.

The petitioner Markot stated that on February 5, 6 and 7, 1979, her English class for the entire period was engaged in silent reading only and that no other activity involving students took place for three consecutive days.

Petitioner Markot requested a closed hearing with the respondent Hawthorne Board of Education which was held on February 20, 1979, extensive testimony being tendered, and subsequent to deliberation the respondent Hawthorne Board of Education enacted a resolution terminating her employment and denying tenure, based on the recommendation of the entire administrative staff of the Hawthorne High School.

An expert witness testified that a procedure of "silent reading" with many other nuances, is viewed by some educational authorities as a meaningful educational tool. The same expert conceded that other educational sources regard such silent reading as a wasteful use of precious class time, involving an activity that youngsters should be pursuing in study halls, in the library or at home.

The trial Court, pursuant to Federal Rule of Civil Procedure 41(b), granted an involuntary dismissal to all respondents on motion, setting forth detailed findings of fact and conclusions of law, appearing in petitioners' Appendix (A. 3-13).

REASONS FOR DENYING THE WRIT

It is reasonable for a Board of Education to conclude that where an English teacher literally abandons the substantive teaching of English for entire class periods on numerous occasions, during which hiatus both students and the teacher are involved in no other activity except reading to themselves, such conduct is tantamount to converting an English class into a supervised study, a dismal pedagogic performance and most assuredly ample justification for a Board of Education in the exercise of its broad discretion to deny the granting of tenure. Under such circumstances, the assertion that a writ of certiorari be granted by this Court by virtue of an unlawful intrusion into the individual teacher's academic freedom, freedom of speech, due process or any constitutional right is without a semblance of merit.

Respondent, Board of Education, pursuant to the recommendation of its administrative staff, the principal of the high school, vice principal of the high school and the superintendent of schools, exercised its discretion to deny a tenure appointment to the petitioner, Markot. It is undisputed that the administrators' recommendations and the Board's action indicated disillusionment and dissatisfaction with the petitioner's extensive use of what is described by petitioner Markot as "silent reading" in the freshman English I Literature class and the manner in which she maintained her lesson plan book.

This petitioner asserts that she possesses a constitutional right to insist that entire English Literature periods for freshmen shall involve nothing other than students reading to themselves while she, as the teacher, reads to herself and if the Board of Education, in the exercise of its

discretion, acknowledges the recommendation of its administrators and determines this to be an unimpressive teaching performance and denies her the accrual of tenure, such action by the Board of Education and the school administrators is intrusion into her constitutional right of free speech and academic freedom. While §1983 has been a fertile arena for exotic claims, the statute was never intended to foster the absurd. The claim proffered by petitioners clearly falls in that category.

The individual respondents and the respondent, Hawthorne Board of Education, contend that this claim is in fact a trivialization of treasured constitutional liberties. In reality, it is a ruse; and frankly, a blatant attempt to provide a cloak of constitutional protection to pedagogic indolence in the guise of the First Amendment.

It is noteworthy to consider the innumerable deleterious ramifications of petitioners' contentions. For example, if a board of education employs a French teacher and pursuant to the recommendation of a high school principal denies her tenure appointment, stating as a reason that school administrators deemed her pattern of only using cassettes to teach French with virtually no attempt to converse herself in French with the class, such a subjective assessment would represent an unlawful intrusion of academic freedom and freedom of speech and be impermissible. Likewise, a determination by a board not to grant tenure to a science teacher who, in the judgment of school administrators and pursuant to their recommendation concluded that a teacher utilized films to an excessive degree neglecting active laboratory experiments or failed to foster lively class discussions, which the board determined to be less than desirable or an uninspiring teaching performance would be forbidden as an invidious intrusion of free speech and academic freedom. By the same token, a history

teacher might contend and insist through a constitutional shield that her history class will do nothing except read newspapers silently for unlimited portions of a term. The argument of petitioners is not merely unacceptable but strikingly meritless. Such a determination would preclude school administrators and the Board from rendering any value judgments and totally vitiate the discretionary right of a board of education to grant or deny tenure.

It is quite persuasive to consider and recognize what this case does not involve. It is not remotely similar in form or substance to the factual circumstances revealed in the line of decisions that set forth the parameters of First Amendment protection accorded to students, teachers, school personnel and public employees in general. While it is an appropriate generalization that in virtually every Federal Court decision pertaining to First Amendment rights vis-a-vis teacher comments, whether in the classroom or out of the classroom, the crucial issue invariably involves balancing the interest of the State as an employer against the right of free expression by the public employee. Very frequently, there arises the typical setting of bitter public comments by a teacher against a board of education and the necessity for determining whether subsequent action taken by a board of education is or is not in the nature of forbidden retaliation against the protected right of free expression by a teacher as to matters of general public concern. *Gilbertson* v. *McAllister,* 403 F.Supp. 1 (1975). Also somewhat frequently there are charges of a school district acting in the impermissible censure role exceeding either by direct or indirect means to impede the discussion or exchange of controversial subject matters by teachers and students in the classroom or elsewhere. None of these are remotely involved in the instant matter. There is not the slightest suggestion that the Board of Education or the individual respondents acted

in retaliation for what the petitioner Markot expressed in public or private pertaining to a criticism of school board operations, or to the content of class discussion, or what was expressed by the petitioner in the classroom pertaining to an opinion, or in the discussion of a controversial subject matter. Quite to the contrary, there is the undisputed absence of any subtle or hidden motivations. There is no hint of seeking to achieve by indirection that which the Board may not accomplish directly. The content of what this petitioner as a teacher desired to *"think, state or express in or out of the clasroom" is just not at issue.*

It is undisputed that the respondent, Robert N. Hausner, a new principal, arrived on February 1, 1979, with no knowledge even as to the existence of petitioner. The new principal embarked on his statutorily mandated task of observing and evaluating non-tenured personnel which included the petitioner. With no predisposition as to any members of the staff, how could Dr. Hausner, having never known the petitioner, at least until the time of his first observation, be anything but impartial. His visit to petitioner Markot's class on February 5, 1979, in anticipation of observing the teaching of an English I Literature course resulted in Dr. Hausner observing at least in his assessment an English teacher supervising a study period but not teaching her subject matter. Instead of an active English Literature teaching experience, students were doing nothing other than reading to themselves while the teacher read to herself, which activity continued into the next day (in fact, admitted by the petitioner to be the sole activity for three consecutive days). This led to Dr. Hausner's assessment and judgment that at the very least this was neither desirable or a satisfactory teaching performance by the petitioner. This coupled with petitioner's indication that this extensive silent reading activity had been pursued because there had been a "shortage of books",

which statement at best was deliberately misleading, and at worst a patent falsehood, together with the further assertion that silent reading was utilized because there was a wide discrepancy in the reading abilities of the students, which was also completely inaccurate, indicates beyond question that freedom of expression or academic freedom is a subject matter that is not involved in this case in any shape or form. It is a bogus issue and no tortured manipulation of the facts can infuse vitality into this specious assertion.

Surely, it is an appropriate and reasonable determination by a high school principal to observe an English teacher and render both an objective and subjective analysis as to her style, her presentation of a subject matter to a class, and her ability to inspire student interest, which must be acknowledged as legitimate factors that a principal as an evaluator may appropriately utilize in determining whether tenure should be recommended. In fact, this is and was Dr. Hausner's duty. It is also apparent that no matter what variations of the facts are considered in the instant matter, that is, whether silent reading was utilized for one-half of the period, for the whole period, for a substantial part of the period, or whatever modified version, it is an intellectual mockery to suggest that a board of education commits a constitutional intrusion when it concludes, pursuant to the recommendation of its administrative staff, that such silent reading reflects an inadequate teaching performance.

In *Clark* v. *Holmes,* 474 F.2d 928 (1972), a non-tenured teacher was denied a tenure appointment and in filing a §1983 action concluded that administrators and the university penalized him from exercising his right to freedom of speech. The factual setting indicated that plaintiff Clark had counseled an excessive number of students

instead of referring them to the university's professional counselors, overemphasized sex in his health survey course, counseled students with his office door closed and belittled other staff members in discussions with students. The Court made the following observation as to his claim of First Amendment intrusion, stating:

> "First, Clark construes too broadly the extent of his First Amendment rights and thus slights the interest of the State in providing its educational services according to policies it deems proper. Clark would have us drastically and radically curtail the scope of discretion which may be exercised by a state school in deciding whom it shall rehire. Second, Clark ignores the factual differences between his case and a case like *Pickering. His disputes with his superiors and colleagues about course content and counselling were not 'matters of public concern' and involved Clark as a teacher rather than as an interested citizen. Compare also* Perry v. Sindermann, 408 U.S. 593, 595, 598, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); Donahue v. Staunton, 471 F.2d 475 (7th Cir. 1972). Further, Clark has cited no sound authority for his proposition that he had a constitutional right to override the wishes and judgment of his superiors and fellow faculty members as to the proper content of the required health course *and the inadvisability of engaging in extensive personal counselling of students, two of the three matters about which most of the defendants were particularly concerned.*
>
> The same reasoning applies to Clark's criticisms of NIU's administration and faculty in front of students. We think the district court correctly decided that this conduct also was not protected by

the First Amendment. *Pickering, which guards a public school teacher's right to speak out publicly on issues of public concern, is factually distinguishable from the present case.* However, we do recognize that, although academic freedom is not one of the enumerated rights of the First Amendment, Parducci v. Rutland, 316 F.Supp. 352, 355 (M.D. Ala. 1970), it is now clear that academic freedom, the preservation of the classroom as a 'market place of ideas,' is one of the safeguarded rights. Healy v. James, 408 U.S. 169, 180-181, 92 S.Ct. 2338, 33 L.Ed.2d 266 (1972). But we do not conceive academic freedom to be a license for uncontrolled expression at variance with established curricular contents and internally destructive of the proper functioning of the institution. First Amendment rights must be applied in light of the special characteristics of the environment in the particular case. Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 506, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969); *Healy, supra. The plaintiff here irresponsibly made captious remarks to a captive audience, one, moreover, that was composed of students who were dependent on him for grades and recommendations. See* Ferguson v. Thomas, 430 F.2d 852, 858 (5th Cir. 1970).

Furthermore, *Pickering suggests that certain legitimate interests* of the State may limit a teacher's right to say what he pleases: for example, (1) *the need to maintain discipline or harmony among co-workers;* (2) the need for confidentiality; (3) *the need to curtail conduct which impedes the teacher's proper and competent performance of his daily duties;* and (4) the need to encourage a close and personal relationship between the employee and his

> superiors, where that relationship calls for loyalty and confidence." (p. 931) (emphasis added)

In *Pickering* v. *Board of Education,* 391 U.S. 563, 88 S.Ct 1731, 20 L.Ed.2d 811 (1968), in which the Supreme Court held public criticism of board action by a teacher which could at the most tangentially and insubstantially be related to his employment is on balance a protected activity for which a board may not impose retaliatory measures. In the instant matter, no matter what variation or version of the facts is presumed, the balancing test pronounced in *Pickering, supra,* and applied in *Clark, supra,* and in virtually every other ensuing Federal decision, is not needed. There is no need to balance one interest as against the other because unquestionably there has been no intrusion of this petitioner's freedom of expression or speech.

This is poignantly illustrated in Dr. Hausner's testimony as he described petitioner Markot's teaching performance during his evaluation:

> "Q. Dr. Hausner, if my memory serves me correctly your observations on February 5th and 6th, and I think you said one or two other meetings with Miss Markot, at any of those times when you've talked to her, and any time did you say, 'Miss Markot, I do not want you to say something'?
>
> A. No.
>
> Q. Now, you look puzzled when you responded to that. Why do you say, "no"?
>
> A. Why should I have told Miss Markot not to say anything?
>
> Q. Did you tell her anything with respect to anything she said in class, that you want her to cease saying whatever she was saying in class?

A. *The point is that she didn't say anything in class.*

Q. So—

A. I would have welcomed the opportunity for Miss Markot to communicate with her classes. Indeed, this is a primary responsibility of an English teacher, to interact with pupils, to hold a meaningful discussion, to enable students to interact with each other. To respond to student questions. To participate in a meaningful discussion and activity. None of these things were going on. *The class was engaged in total silence on two occasions.*

Q. Now, Dr. Hausner, you say you didn't tell her not to say anything. On the other side of the fence, did you say, Miss Markot, I want you to say so-and-so and so-and-so and so-and-so, and not discuss any type of subject matters or indicate to her anything that she should say in class?

A. The only thing that was said to Miss Markot on February 5th was that 'I would expect to see a discussion take place the next time I come into your classroom.'

Q. Nothing about the content?

A. No, not how to teach it. No."

While the doctrine of academic freedom has been formulated, see *Healy* v. *James,* 408 U.S. 169 (1972), it is not conceivable that it has been extended to protect activity involved in this dispute—the right of a teacher to insist the teacher has a constitutional right to conduct a classroom with students doing nothing but reading to themselves. In *Hetrick* v. *Martin,* 480 F.2d 705 (6th Cir. 1973) cert. den., 414 U.S. 1075, the Sixth Circuit sustained that a state university could insist that a teacher implement stressing the fundamentals and to teach on

a basic level, claiming that the First Amendment "does not encompass the right of a nontenured teacher to have her teaching style insulated from review by her superiors." *Hetrick, supra,* at 709.

Also, in *Ahern* v. *Board of Education of School District of Grand Island,* 456 F.2d 399 (7th Cir. 1972), a high school teacher was directed to adhere to the subject matter of the course and to utilize conventional teaching methods. Dismissal of Ahern was held by the Court affirming that a teacher has no right to teach her course in a method that contravened the wishes of her employers, with the implicit recognition by the Court that same did not intrude on the free flow of ideas. *Keefe* v. *Geanakos,* 418 F.2d 359 (1st Cir. 1969), and *Parducci* v. *Rutland,* 316 F.Supp. 352 (M.D. Ala. 1970), together with host of other cases, enabled teachers to distribute scholarly and artistic literature even though the decisions involved offensive language. The right to present controversial films and articles about race relations was also cited to be protected activity in *Sterzing* v. *Fort Bend Independent School District,* 376 F.Supp. 657 (S.D. Texas 1972), remanded on other grounds, 496 F.2d 92 (5th Cir. 1974). It is inconceivable that petitioners cite these decisions and a deluge of others with the contention that a classroom teacher has the constitutional right to remain silent in the classroom and insist that her subject matter be achieved by students doing nothing other than reading to themselves.

The common thread of the above "academic freedom" cases is the concept that teachers may not be restricted in efforts to stimulate vigorous, free-flowing debate in their classrooms. It is essentially to assure precisely that which Dr. Hausner described in rendering his evaluation, that is, a lively, energetic discussion. It is towards such an end

that the dissemination of materials, even though on controversial subject matters so long as it possesses sound educational value, should not be precluded.

Petitioners persist in deluging the Court with decision after decision, whether expressed in the guise of "academic freedom" or the "freedom of expression" argument, that involve the activity of a board of education acting as a censor to stifle ideas. That issue is just not involved in the instant matter.

The argument that the individual respondent administrators in the Hawthorne School District and the respondent Hawthorne Board of Education by regarding petitioner's use of "silent reading" as less than an admirable attribute in teaching English Literature and frankly, an indication of basic laziness, is a determination that this Court must prohibit because it comprises an impermissible intrusion into petitioner's freedom of speech and academic expression cannot conceivably rise to the level of a bona fide constitutional contention. The trial Court correctly deemed that petitioners were unable to demonstrate that any constitutionally protected activity might conceivably be deemed as a notivating factor in the Board's decision to terminate her employment. See *Mt. Healthy Board of Education* v. *Doyle,* 429 U.S. 274 (1977).

There exists no sharp conflict among the United States Circuit Courts involving recognition of a Federal cause of action based upon the right of academic freedom under the First and Fourteenth Amendments of the Constitution as it relates to utilizing a particular reasonable teaching methodology which requires resolution by the Supreme Court of the United States.

It is asserted that the decision of the Third Circuit Court of Appeals has now created a glaring lack of uniformity throughout the Federal system in which most circuits recognize the existence of a Federal cause of action extending to protect the use of reasonable teaching methodology, while others do not. This assertion is unsupportable and despite the redundant recital of cases alleged to support such a contention, there is not a single decision of a Federal District Court or a Circuit Court that remotely resembles the facts involved in the instant matter.

The decisions in every instance on close scrutiny involve only methodology that is inseparable from expression. There is always involved a determination by the Court that a board is attempting to stifle, squash or control the free expression of concepts and ideas. Petitioners cite *Wilson* v. *Chancellor*, 418 F.Supp. 1358 (D. Ore. 1976), which recognizes the act of teaching to be a form of expression and descriptions of methods being used in teaching as media. In *Wilson, supra,* however, the board attempted to restrict the use of political speakers which was tantamount to suppressing free expression. Likewise, reliance is placed by petitioners on *Sterzing* v. *Fort Bend Independent School Dist.*, 376 F.Supp. 657 (S.D. Tex. 1972), which again, although talking in terms of methodology, involves the content of the media utilized with the Court holding that the use of controversial films about race relations and controversial articles were protected activities

and that school boards may not stifle expression. Petitioners can cite no case in support of the ineffable assertion involved in the instant matter, and that is, the unimpeded right of a teacher to insist "I want to indulge in complete silence, letting students read to themselves and do absolutely nothing else in class" and should a public school district regard this as a dismal pedagogic performance and not grant tenure this is a fatal intrusion of her constitutional rights.

To contend that the language of various circuits throughout the United States plucked out of context supports this contention is pure sophistry. To convert the instances where the courts have deemed methodolgy such as the use of public speakers and written materials to be so inextricably intertwined with freedom of expression or the content of speech into a constitutional right of a teacher to remain silent and do nothing other than read to herself in class while her students read to themselves because this is her methodology of teaching is sheer nonsense.

In *East Hartford Education Association* v. *Board of Education*, 562 F.2d 838 (1977) the Court indicates that one must be on guard to this clear danger of entertaining unrealistic, tenuous and convoluted claims to First Amendment intrusions, particularly in public education, with the astute observation that:

> "Because teaching is by definition an expressive activity, virtually every decision made by school authorities would raise First Amendment issues calling for federal court intervention." *Id.* at 589.

Federal Courts should be ever vigilant to avoid being immersed in resolution of conflicts that arise in the daily operation of school systems. Deviation from this pattern should occur only when actual, not feigned constitutional intrusions are evident.

Epperson v. *Arkansas,* 393 U.S. 97, 104, 21 L.Ed.2d 228, 234, 89 S.Ct. 266 (1968), set forth in cogent language the guidelines pertaining to Federal judicial intrusion into the operation of the public school system, stating:

> "Judicial interposition in the operation of the public school system of the Nation *raises problems requiring care and restraint.* Our courts, however, have not failed to apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry and of belief. *By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.*" (emphasis added)

The Supreme Court reiterated and expounded on this principle in *Wood* v. *Strickland,* 420 U.S. 308, 326, 43 L.Ed.2d 214, 227, 95 S.Ct. 992 (1975), again stating:

> "• • • It is not the role of the federal courts to set aside decisions of school administrators which the court may view *as lacking a basis in wisdom or compassion.* • • • The system of public education that has evolved in this Nation relies necessarily upon the discretion and judgment of school administrators and school board members and §*1983* was *not intended to be a vehicle for federal court correction of errors in the exercise of that discretion which do not rise to the level of violations of specific constitutional guarantees.* See Epperson v. Arkansas, 393 US 97, 104, 21 L.Ed.2d 228, 89 S.Ct. 226 (1968); Tinker, supra, at 507, 21 L.Ed.2d 731." (emphasis added)

Is it not evident that clearly the instant case presents a factual setting to which the guiding principles prescribed by the Supreme Court of the United States may be applied with ease. Exercise of discretion by a board of education rendered pursuant to the rational judgment of professional educators that the extensive use of such a teaching methodology is not an impressive or desirable teaching attribute and while it may be tolerated or even advocated by some educational experts it is not what Hawthorne desires, and surely it is within the prerogative of the Board of Education to determine.

A board of education should possess the right to deny tenure to the teacher of any subject matter considering the opinion and observation of school administrators that students have not become involved in extensive discussions, that a class appears to be monotonous or that the style of the teacher in lecturing or otherwise fosters minimal enthusiam. This and numerous similar illustrations fall into the category of legitimate value judgments and the exercise of reasonable discretion by a board of education. The simple point is that the Court's role is not to decide educational policies or to pass on what is the proper exercise of discretion that falls within the framework of educational policies. The function of the Court is only to intrude where on balance there is a blatant, clear violation of freedom of expression, association or other constitutional liberties.

The Court in *East Hartford, supra,* states that neither allegations of free speech nor academic freedom should override the discretion of a board of education to impose a dress code on its teachers. In *East Hartford, supra,* the Court further noted it should only intervene in school matters when a board has strayed outside the area committed to its discretion. The individual respondents and the respondent Hawthorne Board of Education have not

strayed outside the area committed to their discretion in determining from an educational viewpoint that extensive use of silent reading instead of active teaching of English Literature is a legitimate consideration in determining whether the property right of tenure shall be granted to the petitioner.

In *Hetrick* v. *Martin,* 480 F.2d 705, cert. den. 414 U.S. 1075, 38 L.Ed.2d 482, 94 S.Ct. 592, it was determined that academic freedom does not encompass the right of a non-tenured teacher to have her teaching style insulated from review by her superiors when they determined whether she had merited tenure status merely because her methods and philosophy are considered acceptable somewhere within the teaching profession, and administration of the public school may, *consistent with the First Amendment,* fail to renew non-tenured teachers because of displeasure with her "pedagogical attitudes", teaching methods, and philosophy of education.

This is consistent with the undoubted right of the State and local board of education within limits set by the State to prescribe the curriculum for its public schools. *Epperson* v. *Arkansas,* at 236. The trial Court properly recognized that the canned testimony of educational expert, Dr. Diskin, espousing the attributes of silent reading should not be permitted to erode the discretion that appropriately reposes with the Board of Education.

No federal court has expressed more eloquently the need to be aware of the genuine danger of extending credence to feigned, tenuous allegations of constitutional deprivations such as appears in the instant case than our own Third Circuit. In *Zeller* v. *Donegal School District Bd. of Education,* 517 F.2d 600 (1975), after holding that a hair length regulation for athletic participation rendered by a school district does not justify a claim for constitu-

tional intrusion, the Court elaborated on the general subject matter of discretion as to regulations and operation of the school district, stating:

> "In summary, there are areas of state school regulation in which the federal courts should not intrude. Without attempting to survey a bright line between permissible and impermissible intervention, we conclude that student hair cases fall on the side where the wisdom and experience of school authorities must be deemed superior and preferable to the federal judiciary's. We decline to cast our conclusion in the form of a neat, stylized lable—to pitch our decision into the jurisprudential pigeonhole of abstention. We merely hold, as a matter of policy and in the absence of 'general' and 'transcending' reasons to the contrary, that the asserted claim is not one for which relief can be granted in a federal forum.
>
> Having made a policy determination, it is important to underscore why we have drawn the line we have. In full recognition of the duty of federal courts to be hospitable, we have ruled deliberately. We have acted because of a felt concern that the sturdy tree of the federal judiciary is in need of pruning if it is to remain strong and stand tall, protecting basic individual liberties against unconstitutional impingements. We are concerned that, if the trimming process does not begin somewhere, the tree may topple of its own weight; that the proliferation of claims with exotic concepts of real or imagined constitutional deprivations may very well dilute protections now assured basic rights. We have a genuine fear of 'trivialization' of the Constitution. If this should occur, some of the monumental accomplishments in defining fundamental human rights and

liberties may be compromised, and the protections accorded those rights and liberties threatened.

'We must never forget,' in Justice Marshall's powerful phrase, 'that it is a *constitution* we are expounding.' If it is to be a document not stating 'rules for the passing hour, but principles for an expanding future', *we must not permit it to be seized upon in wholesale fashion, recklessly or indiscriminately.* Otherwise, in every case where the defendant has acted under color of state law, the visible rules and principles of traditional disciplines of state law may be discarded for comparatively imprecise, newly-formed dimensions of the Fourteenth Amendment's 'due process' and 'liberty' concepts. Predictability and reckonability of societal regulations will lessen, and order and regularity of the law will suffer." (emphasis added)

The claim of this petitioner is a striking illustration of the concern expressed in *Zeller, supra.* The claim at best is an exotic concept of an imagined constitutional deprivation which dilutes and trivializes the First Amendment concept. This Third Circuit Court of Appeals and the Federal District Courts within the Third Circuit provide no succor to the position of petitioners. *Aumiller* v. *University of Delaware,* 434 F.Supp. 1273 (D.Del. 1977) stated the University school administration could not discharge a non-tenured lecturer as a result of statements made by him on the subject of homosexuality. To the same effect is *Eckerd* v. *Indian River School District,* 475 F.Supp. 1350 (D.Del. 1979), which refused to permit the discharge of a tenured teacher as a result of comments in the classroom which were deemed not to intrude in his performance or capacity as a teacher.

To conclude the individual respondents or the respondent, Hawthorne Board of Education, intruded on the constitutional rights of this petitioner by performing their public duty to evaluate and assess the efficacy of her teaching methods and philosophy of education would reduce the discretion of a local school board to the level of an apparition. It would furthermore immerse the federal courts in the day-to-day operation of the public school system and convert the federal judiciary into a source for the correction of errors in the exercise of discretion irrespective of any actual nexus to constitutional violations.

Petitioner Markot, despite flooding her Brief with a seemingly endless number of citations, has yet to proffer a single decision that remotely supports her position that a striking conflict exists between circuits. A review of the cases cited by petitioner disclose that a minimal number involve non-tenured personnel, but more significantly, in virtually every instance concern a factual setting of school districts, either in the role of censoring materials utilized by both tenured and non-tenured teachers stemming from asserted obscenities or salacious materials, or seeking to stifle the discussion of controversial subject matters in the community. Respondents have heretofore stated and are constrained to reiterate by virtue of the argument proffered by petitioners that freedom of expression or academic freedom, whether asserted to be violated in the guise or deprivation of liberty and property or substantive due process or any other conceivable constitutional notion are just not involved in the instant case. No one sought to tell or forbid the petitioner Markot what to say. It is the contention of the respondent Board that at the very least a board of education possesses the discretion to conclude that an English teacher should not be granted tenure when her class-

room performance reflects that instead of active teaching she is conducting a class in a fashion tantamount to a study period in which students do nothing except read to themselves while she reads to herself. Under such circumstances, when a board of education denies a tenure appointment to a teacher and then only after a full hearing, it has complied with every conceivable requirement of procedural and substantive due process.

A writ of certiorari is not warranted on a theory that there exists a severe dichotomy between the lower federal courts or between the various circuit courts of appeal. It is respectfully submitted that the decisions of the United States District Court for the District of New Jersey and the United States Court of Appeals for the Third Circuit are correct and presents no sharp constitutional conflict with other circuits in the federal judiciary.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court deny the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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